NO. 56509-9-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

MICHAEL COLASURDO JR.,

Plaintiff,

v.

ESTERLINE TECHNOLOGIES CORP.
HYTEK FINISHES CO.,

Defendant.

BRIEF OF RESPONDENT

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I. INTRODUCTION

The Industrial Insurance Act does not permit an employer to claw back years of workers' compensation benefits when it fails to timely challenge allowance of a worker's claim. Under the Act, a Department of Labor and Industries' order allowing a workers' compensation claim becomes final and binding when no party protests the order within 60 days. RCW 51.52.050, .060. Esterline Technologies Corp. waited more than three years to challenge a Department order allowing Michael Colasurdo's claim, arguing that because Colasurdo did not file the claim within one year of his injury (as required by RCW 51.28.050), the order was void. But, under *Marley v. Department of Labor & Industries*,[1] a Department order is void only when the Department lacks jurisdiction to enter the order. Because the Department has original jurisdiction over all cases involving injured workers, the Department had the power to

[1] *Marley v. Dep't of Lab. & Indus.*, 125 Wn.2d 533, 886 P.2d 189 (1994).

adjudicate Colasurdo's claim, including the determination of whether the claim was timely. So an error of law in that determination does not render the order void ab initio. Instead, an employer must appeal orders involving such adjudicator error within 60 days.

Esterline's arguments to the contrary lack merit. The company points to *Wheaton v. Department of Labor & Industries*,[2] a 1952 Supreme Court decision, to argue that a Department order that incorrectly allows an untimely claim is void. But *Marley* expressly overruled cases like *Wheaton*, explaining that legal errors do not render Department orders void. And, as the Supreme Court recently recognized in *Kovacs v. Department of Labor & Industries*,[3] the time limit to file a workers' compensation claim is a statute of limitations and not a jurisdictional requirement. Because a party may waive a

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[2] *Wheaton v. Dep't of Lab. & Indus*., 40 Wn.2d 56, 240 P.2d 567 (1952).

[3] *Kovacs v. Dep't of Lab. & Indus*., 186 Wn.2d 95, 375 P.3d 669 (2016).

statute of limitations defense by failing to timely assert it, the superior court correctly determined that Esterline's failure to raise a timeliness challenge to the Department's allowance order within 60 days precluded the company from protesting claim allowance. This Court should affirm.

II. ISSUE

> Did the superior court correctly affirm the Department's allowance order when, as required by *Marley*, the Department had subject matter jurisdiction over the type of matter in controversy, and no party appealed the order within 60 days?

III. STATEMENT OF THE CASE

A. After the Department Allowed Colasurdo's Claim for Benefits, Esterline Waited Three Years Before Appealing

Colasurdo injured his low back on February 4, 2014, while working at Esterline. CP 112. He first reported the injury to the company using a written form on August 5, 2015. *Id*. Esterline submitted the form to the Department in April 2016. *Id*. And in June 2016, the Department issued an order allowing Colasurdo's claim for workers' compensation benefits. CP 151.

As a self-insured employer, Esterline was responsible for directly paying Colasurdo his disability and medical benefits. CP 63; *see Boeing Co. v. Doss*, 183 Wn.2d 54, 58, 347 P.3d 1083 (2015).

The parties agree that Colasurdo did not file his claim within one year of his industrial injury. Under the Industrial Insurance Act, "[n]o application shall be valid or claim thereunder enforceable unless filed within one year after the day upon which the injury occurred. . . ." RCW 51.28.050. On the other hand, when no party appeals a Department order within 60 days, the order becomes final and binding, and is no longer subject to challenge. RCW 51.52.050, .060; *Marley*, 125 Wn.2d, at 543.

Esterline did not appeal the Department's order allowing Colasurdo's claim within the 60-day period to file an appeal. CP 112. Instead, it waited three years, until June 13, 2019, to challenge the order. *Id.* Despite the absence of a timely

employer appeal, the Department nevertheless issued a new order that rejected Colasurdo's claim.[4] CP 149.

B. After the Board Affirmed the Rejection of Colasurdo's Claim, the Superior Court Reversed, Holding that the Department's Original Allowance Order Was Final and Binding

Colasurdo appealed the Department's rejection order to the Board of Industrial Insurance Appeals. CP 142. He and Esterline each moved for judgment on stipulated facts. CP 65-127. The Department took no position at the Board. *See* CP 63.

Following oral argument, an industrial appeals judge affirmed the rejection of Colasurdo's claim. CP 58-63. The judge reasoned that, under *Wheaton*, "there is a statutorily imposed *jurisdictional* limitation upon the Department's authority to allow an untimely filed claim." CP 60-61 (emphasis added). Thus, the judge ruled that Esterline was entitled to challenge the order at any time and that the 60-day

[4] The Department initially issued an order affirming the 2016 allowance order. CP 150. But after Esterline appealed to the Board, the Department issued withdrew its order and issued a subsequent order rejecting Colasurdo's claim. CP 149.

appeal period did not apply. *See* CP 59-62. Colasurdo filed a petition for review of this decision, CP 37-49, which the Board denied. CP 22.

Colasurdo appealed to superior court. CP 1. There, the Department determined its rejection order was incorrect, and it asked the court to reverse the Board's order and reinstate Colasurdo's workers' compensation claim. CP 201-11. At oral argument, the Department argued that, under *Marley*, an order cannot be found void or void ab initio unless the Department lacked personal or subject matter jurisdiction at the time the order was issued. RP 12.

The superior court issued an order reversing the Board's order. CP 219-21. The court concluded that, because the Department had personal and subject matter jurisdiction to allow Colasurdo's claim, the allowance order was not void. *Id*. The court explained that, while the Department's order was erroneous in that it allowed a claim filed after the statutory one-year time period had elapsed, the allowance order was

nonetheless final and binding because it was not timely appealed. CP 219-21.

Esterline appeals to this Court.

IV. STANDARD OF REVIEW

In appeals under the Industrial Insurance Act, the Court reviews the superior court decision, not the decision of the Board. *Rogers v. Dep't of Lab. & Indus.,* 151 Wn. App. 174, 180, 210 P.3d 355 (2009). The Court applies the ordinary civil standards of review to the superior court decision. RCW 51.52.140; *Rogers*, 151 Wn. App. at 180-81.

Statutory construction is an issue of law the court reviews de novo. *Anderson v. Dussault*, 181 Wn.2d 360, 368, 333 P.3d 395 (2014).

The court's review of a tribunal's subject matter jurisdiction is likewise de novo. *In re Marriage of McDermott*, 175 Wn. App. 467, 479, 307 P.3d 717 (2013).

V. ARGUMENT

Unless appealed, Department orders become final and binding 60 days after the Department communicates the order to the worker. RCW 51.52.050. The court does not deem an order void for errors of law or other adjudicative error. *Marley*, 125 Wn.2d at 538, 541-42. Instead, under *Marley*, an order is not void unless the Department lacked personal or subject matter jurisdiction over the claim. *Id.*

The superior court properly determined that the Department's allowance order here became final and binding when Esterline waited three years to appeal the order. The order allowing the claim was legal error but was not void because the Department had original subject matter jurisdiction over the order, and thus the power to decide the case even if wrong. *Id.* at 543.[5] Original subject matter jurisdiction turns on whether

[5] The Department must also have personal jurisdiction over the parties. Although Esterline suggests in passing that the Department lacked personal jurisdiction, it provides no supporting argument or citation to authority, *e.g.*, Appellant's Brief (AB) at 6, to support a claim that there is no personal

an agency may consider a "type of controversy." *Marley*, 125 Wn.2d at 539. It doesn't turn on the individual facts of a case—like whether a claim filing is timely. The Department may consider the "type of controversy" raised by workers alleging industrial injuries: this power is denoted its "original jurisdiction" by RCW 51.04.010. And the Department's authority includes the power to decide all issues related to claim allowance, including timeliness, so there is no basis for finding the Department's allowance order void.

Esterline's untimely appeal also constitutes a waiver of RCW 51.28.050's statute of limitations.

A. Because the Department Had Subject Matter Jurisdiction to Allow Colasurdo's Claim, the Allowance Order Became Final and Binding When No Party Appealed the Order Within 60 Days

The superior court properly followed *Marley*, which overruled *Wheaton.* Esterline's arguments to the contrary fail.

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jurisdiction, and the Court should not consider this issue. *Darkenwald v. Emp. Sec. Dep't*, 183 Wn.2d 237, 248-49, 350 P.3d 647 (2015).

1. Consistent with principles of finality and repose, Department Orders that are not appealed within 60 days become final and binding

The Industrial Insurance Act provides for "sure and certain relief" to workers. RCW 51.04.010. As part of this "sure and certain relief," the Act provides for finality of Department orders to prevent parties from disrupting settled expectations about claims by attacking Department orders years later.

Under the Act, a Department order allowing a workers' compensation claim becomes final and binding when no party protests or appeals the order within 60 days. RCW 51.52.050 ("such final order…shall become final within sixty days from the date the order is communicated to the parties unless a written request for reconsideration is filed with the department of labor and industries"), .060. An unappealed final order from the Department "precludes the parties from rearguing the same claim." *Marley*, 125 Wn.2d at 538; *Perry v. Dep't of Lab. & Indus*., 48 Wn.2d 205, 209, 292 P.2d 366 (1956). Department orders are binding on both the Department and the parties

"unless such action of the department is set aside upon appeal or is vacated for fraud or something of a like nature." *Le Bire v. Dep't of Lab. & Indus.*, 14 Wn.2d 407, 415, 128 P.2d 308 (1942).

Thus, the principle of res judicata applies to Department orders. *Marley*, 125 Wn.2d at 538. Finality of decisions avoids piecemeal litigation and provides repose. *Spokane Research & Def. Fund v. City of Spokane*, 155 Wn.2d 89, 99, 117 P.3d 1117 (2005); *Pederson v. Potter*, 103 Wn. App. 62, 71, 11 P.3d 833 (2000). "It puts an end to strife, produces certainty as to individual rights, and gives dignity and respect to judicial proceedings." *Walsh v. Wolff*, 32 Wn.2d 285, 287, 201 P.2d 215 (1949). Never is such repose more important than with regard to an unappealed decision to allow a worker's claim for benefits, since a worker with a final, allowed claim should not have to worry that a belated appeal by an employer will result in the termination of the worker's benefits or in the worker having to repay the benefits received. The principle of repose

prevents an employer from waiting three years to challenge an agency decision.

In this case, Esterline's arguments would unwind three years' worth of paid benefits. But Esterline's three-year delay in appealing the Department's allowance order caused the order to become final and binding under RCW 51.52.050. Esterline challenges the Department's allowance order on the basis that Colasurdo did not file it within one year of his industrial injury. But it was Esterline's responsibility to timely assert its challenges to the allowance order within 60 days. By its own admission, it failed to do so. CP 112; AB 3. So Esterline is precluded from arguing that Colasurdo's claim was untimely because of this failure. Its failure to appeal the allowance order within 60 days functions as a waiver of the defense that Colasurdo's claim was untimely.

2. The Department's allowance order is not void because the Department had original subject matter jurisdiction to issue this order

Esterline's assertion that the Department's allowance order is void ab initio because Colasurdo did not file his industrial insurance claim within one year of his workplace injury is contrary to the Supreme Court's holding in *Marley*. Under *Marley*, Department orders cannot be found void unless the Department lacked personal or subject matter jurisdiction. *Marley,* 125 Wn.2d, at 541. The Department has power over all actions for workplace injuries. RCW 51.04.010. As part of routine Department functioning, it decides whether to allow a claim filed by a worker, which requires it to consider a whole host of statutory requirements, including timely claim filing. So it necessarily has original jurisdiction to decide whether a workers' compensation claim is timely filed—a threshold determination in every claim. The Department's error in

allowing an untimely claim does not render its allowance order void or void ab initio. *See Marley*, 125 Wn.2d at 538, 541-42.[6]

Subject matter jurisdiction is the tribunal's authority to adjudicate the "*type of controversy* involved in an action." *Marley*, 125 Wn.2d at 539. Subject matter jurisdiction is often confused with "the court's authority to rule in a particular manner." *Id*. But so long as the type of controversy is within the court's authority to adjudicate, "then all other defects or errors go to something other than subject matter jurisdiction." *Dougherty v. Dep't of Lab. & Indus*., 150 Wn.2d 310, 316, 76 P.3d 1183 (2003). The "type of controversy" means the general category of case "without regard to the facts of the particular case." *Id*. at 317. The typical example would be that a superior court has subject matter jurisdiction to consider the type of

[6] Esterline argues that that there is a difference between "void" and "void ab initio." AB 12. *Marley* makes no such distinction. As the dictionary reveals, ultimately both terms mean that something would not have effect, and any distinction is meaningless in the context of this case. Void, *Black's Law Dictionary* (11th ed. 2019).

controversy of dissolutions but the Department of Labor & Industries does not. *Cf. In re Marriage of Major*, 71 Wn. App. 531, 534, 859 P.2d 1262 (1993) (superior court has original jurisdiction over family court matters). All the sub-issues about dissolution, including timely filing, are included within superior court's subject matter jurisdiction. Likewise, for workers' compensation, the Department may consider all the sub-issues related to a claim, including timeliness.

Individual issues that are at issue in a case (such as timeliness) do not determine whether an entity has jurisdiction over the case; instead, jurisdiction determines whether the agency can consider any issue raised by the case. "A lack of subject matter jurisdiction implies that an agency has no authority to decide the claim at all, let alone order a particular kind of relief." *Yow v. Dep't of Health Unlicensed Practice Program*, 147 Wn. App. 807, 815, 199 P.3d 417 (2008).

In enacting the Industrial Insurance Act, the Legislature abolished the state courts' original jurisdiction over workplace

injuries. *Dougherty*, 150 Wn.2d at 314; RCW 51.04.010. Under the Act, the Department has original jurisdiction "of cases involving injured workers, and the superior courts possess appellate jurisdiction." *Id*. When the court or agency has been given the authority to adjudicate the type of controversy that is before it, its order relating to that controversy cannot be found void for lack of subject matter jurisdiction. *Marley*, 125 Wn.2d at 542.

Whether Colasurdo's industrial injury should be accepted is a type of controversy that is within the Department's authority to adjudicate. The Department's subject matter jurisdiction includes the ability to determine whether to allow a workers' compensation claim, including the decision as to whether a claim was timely filed.

Although Colasurdo did not file his claim within RCW 51.28.050's one-year time limit, the Department's error in allowing the claim does not negate the Department's subject matter jurisdiction over the claim. As the *Marley* Court

explained, "the power to decide includes the power to decide wrong, and an erroneous decision is as binding as one that is correct until set aside or corrected in a manner provided by law." *Marley*, 125 Wn.2d at 543 (quotations removed). The Department did not "seize jurisdiction" as Esterline asserts (AB at 7) rather, it had and retained subject matter jurisdiction throughout the history of Colasurdo's claim. Because the error here relates to the particular facts at issue in the order and not to whether the controversy fell within the general category of claim that the Department has the authority to adjudicate, the order allowing Colasurdo's claim is not void.

Esterline argues that the difference in *Marley* was that subject jurisdiction had attached with an initial timely filing of the claim (and an untimely filing of an appeal to a later order), where here that didn't occur. AB 14. Thus, it argues there was subject matter jurisdiction from the beginning of the claim in *Marley. Id.* But this argument looks at an individual action on a case. In other words, it looks to the individual action of

allowing the claim as invoking jurisdiction. Yet subject matter jurisdiction is not concerned with individual actions like timeliness but rather whether there is authority to consider the broad topic. *Marley*, 125 Wn.2d at 542; *Yow,* 147 Wn. App. at 815. The Department may address the general topic, including whether it is timely. This general authority conveyed original subject matter jurisdiction, not any one action by Colasurdo, Esterline, or the Department.

3. Esterline's Reliance on *Wheaton* Is Misplaced Because *Marley* Expressly Overruled the Line of Cases Holding Orders Void for Legal Error

Esterline asserts that the Department's allowance order is void ab initio under *Wheaton*, but its reliance on that case is misplaced. *See* AB 11. In *Marley*, the Supreme Court explicitly overruled *Booth v. Department of Labor & Industries* and cases, like *Wheaton*, that rely on it. *Marley*, 125 Wn.2d at 542 (citing *Booth v. Dep't of Lab. & Indus*., 189 Wash. 201, 64 P.2d 505 (1937)). As the Court held, "we overrule *Booth* and the cases which followed to the extent they depart from the

Restatement (Second) of Judgments §§ 1, 11 (1982)." *Marley*, 125 Wn.2d at 542 . In *Marley*, the Court discussed two lines of cases. The first properly held that final orders were only set aside for fraud or the like. 125 Wn.2d at 537 (citing *Le Bire v. Dep't of Lab. & Indus.*, 14 Wn.2d 407, 415, 128 P.2d 308 (1942)). And the other, *Booth* et al., relied on the disfavored concept that an error of law rendered all orders on a case void. 125 Wn.2d at 542 (citing *Booth*, 189 Wash. At 208-09) (invalid action about lump sum payment rendered order void)).

The *Marley* Court overruled the *Booth* line of cases, and it held that "[a]n order from the Department is void only when the Department lacks personal or subject matter jurisdiction."[7] *Id*. at 542. And subject matter jurisdiction depends not on whether the Department order is correct, but on whether it had

[7] As noted above, Esterline does not seriously dispute that the Department had personal jurisdiction over the parties when it entered the allowance order. *See* note 5, supra.

the authority to adjudicate the type of controversy at issue. *See Marley,*125 Wn.2d at 542.

The *Marley* Court directed that the cases that departed from the Restatement (Second) of Judgements, sections one and 11, were overruled. 125 Wn.2d at 542 ("we overrule *Booth* and the cases which followed to the extent they depart from the Restatement (Second) of Judgments §§ 1, 11 (1982)."). *Wheaton's* analysis departs substantially from sections one and 11 of the Restatement (Second) of Judgments. Section one, entitled *Requisites of a Valid Judgment*, provides that a "court has authority to render judgment in an action when the court has jurisdiction of the subject matter of the action [and personal jurisdiction over the parties]." Restatement (Second) of Judgments, §1 (1982). Section 11 explains that "[a] judgment may properly be rendered against a party only if the court has authority to adjudicate the type of controversy involved in the action." Restatement (Second) of Judgments, §11 (1982). Both of these sections are consistent with the *Marley* Court's

warnings about the danger of conflating jurisdiction with the authority to rule in a particular manner. *Marley*, 125 Wn.2d at 542. Thus, under the Court's current jurisprudence, so long as the Department has authority to adjudicate a controversy, even its erroneous orders become final and binding after 60 days.

Wheaton, which relied expressly on *Booth* (*see Wheaton,* 40 Wn.2d at 58), does not comport with this modern framework. There, in declaring void a Department order allowing an untimely claim, the Court's analysis turned in part on the incorrectness of the order. As the Court explained, the Department may only allow claims filed within the time prescribed by the Legislature, and the Department "has no power to…waive the statute extinguishing this right." *Wheaton*, 40 Wn.2d 56 at 58. Thus, in the Court's view at that time, an incorrect Department order allowing an untimely claim was "void ab initio." *Id*. This, of course, is exactly the danger recognized and addressed in *Marley*: that Department orders issued in legal error could remain subject to challenge years

after their entry, upsetting longstanding expectations and leading to unjust results.

If Esterline had timely appealed the order allowing Colasurdo's claim, it could have had the Board or a court reverse the Department's erroneous decision. But having waited three years to bring its challenge, it cannot do so now. As discussed above, the Department's allowance order cannot be rendered void under *Marley*. And *Wheaton* likewise provides no assistance to Esterline when the Supreme Court has expressly overruled this line of cases. Because the Department's legal error does not deprive the Department of subject matter jurisdiction to decide the matter in controversy, under modern Washington jurisprudence, Esterline cannot avoid the consequences of its failure to timely appeal. The Department's unappealed allowance order precludes the company's belated contention that the Department must reject Colasurdo's claim.

B. RCW 51.28.050's Time Limit for Filing a Claim Is a Statute of Limitations, Not a Jurisdictional Requirement, and Esterline Waived this Defense by Failing to Appeal the Allowance Order

A proper construction of RCW 51.28.050 is that it is a statute of limitations, not a jurisdictional statute. And to the extent the statute is ambiguous on this point, then this Court must liberally interpret the statute in the workers' favor. *Dennis v. Dep't of Lab. & Indus.*, 109 Wn.2d 467, 470, 745 P.2d 1295 (1987); RCW 51.12.010.

1. The Supreme Court has held that RCW 51.28.050 is a statute of limitations

Even setting aside the *Marley* Court's overruling of *Wheaton*, as the Court recently recognized in *Kovacs*, RCW 51.28.050's time limitation for filing a workers' compensation claim is a statute of limitations, not a jurisdictional requirement. *Kovacs*, 186 Wn.2d at 101. "A statute of limitation is merely a time limit on when an action may be commenced; properly understood, it neither confers nor removes subject matter jurisdiction." *Mut. of Enumclaw Ins. Co. v. T & G Const., Inc.*,

165 Wn.2d 255, 266, 199 P.3d 376 (2008). Thus, unlike issues of subject matter jurisdiction, "[a] party waives a statute of limitations affirmative defense (1) by engaging in conduct that is inconsistent with that party's later assertion of the defense or (2) by being dilatory in asserting the defense." *Greenhalgh v. Dep't of Corr.*, 170 Wn. App. 137, 144, 282 P.3d 1175 (2012).

The *Kovacs* Court properly characterized RCW 51.28.050's time limit as a statute of limitations. Because the case required the Court to "decide whether the legislature intended to treat the statute of limitations for workers' compensation claims differently from other statutes of limitations" (*Kovacs*, 186 Wn.2d at 98), its characterization of this time limit is not dicta. *See Protect the Peninsula's Future v. City of Port Angeles*, 175 Wn. App. 201, 215, 304 P.3d 914 (2013) ("A statement is dicta when it is not necessary to the court's decision in a case."). Because the Court was comparing RCW 51.28.050's time limit for filing to "other statutes of limitations," its characterization of this time limit as a statute of

limitations was necessary to its decision. Had the Court determined the statutory time limit to be jurisdictional, a different basis of comparison would apply.[8]

RCW 51.28.050's language demonstrates that it is a statute of limitations. Courts determine whether a statutory time limit is a statute of limitations or a jurisdictional limit through an examination of legislative intent as expressed in the language of the statute. *Nickum v. City of Bainbridge Island*, 153 Wn. App. 366, 377-78, 223 P.3d 1172 (2009); *In re Pers. Restraint of Hoisington*, 99 Wn. App. 423, 431, 993 P.2d 296 (2000). In *Hoisington*, the Court looked to the absence of the

[8] Even the *Wheaton* Court recognized that RCW 51.28.050 of is a statute of limitations. In asserting that the statute's time limit could not be waived, it pointed to its earlier decision in *Nagel v. Department of Labor and Industries*, 189 Wash. 631, 640, 66 P.2d 318 (1937), where the Court opined that "no officer or agency of the state has the right to waive the defense of the statute of limitations." This proposition, of course, has no application where the Department acts in its adjudicative capacity and not as a party. But the Court's citation to *Nagel* demonstrates its acknowledgement that RCW 51.28.050 is a statute of limitations rather than a jurisdictional requirement.

term "jurisdiction" within the controlling statutes to determine that a time limit "functions as a statute of limitations and not as a jurisdictional bar." 99 Wn. App. at 431. Similarly, in *Nickum*, the Court concluded that because "the statute affirmatively separated the time limitation provision from a section that dealt with jurisdiction, the legislature's intent was for the time limit to serve as a statute of limitations and not a jurisdictional limit." 153 Wn. App. at 377-78.

These principles apply here. RCW 51.28.050 provides that "[n]o application shall be valid or claim thereunder enforceable unless filed within one year after the day upon which the injury occurred or the rights of dependents or beneficiaries accrued, except as provided in RCW 51.28.055 and 51.28.025(5)." As in *Hoisington*, the statute does not use the term "jurisdiction" in describing the time limit for an injured worker to commence an action under the Act. And like *Nickum*, the statutory time limit is not located in a section of the Industrial Insurance Act dedicated to jurisdictional issues.

RCW 51.28.050 appears in RCW 51.28, a chapter of the Act that prescribes how workers may file a claim and apply for benefits, in addition to reporting obligations under the Act. The term jurisdiction is not contained within the chapter. Instead, the Department's jurisdiction to adjudicate workplace injuries is set forth in the RCW 51.04.010, a separate section of the Act vesting the Department with original jurisdiction over all workplace injury claims. *See Dougherty*, 150 Wn.2d at 314.[9]

[9] It is important to clarify that statutes of limitations serve a different role in the context of original jurisdiction as opposed to appellate jurisdiction. A party's failure to file an action within the time specified in a statute of limitation does not deprive an entity of its original jurisdiction over the claim, as the statute of limitations can be waived in this context. *Greenhalgh*, 170 Wn. App. at 144. However, for a reviewing court to acquire appellate jurisdiction over a case, it is necessary for the appealing party to comply with the statutory requirements for perfecting an appeal, so a failure to timely perfect an appeal deprives the reviewing court of appellate jurisdiction. *Stewart v. Dep't of Employment Sec.*, 191 Wn.2d 42, 52, 419 P.3d 838 (2018). But this case involves the Department's original jurisdiction over Colasurdo's claim, not a court's appellate jurisdiction over the case, so the statute of limitations is not a jurisdictional requirement.

2. Holding that RCW 51.28.050 is a jurisdictional statute would be contrary to a liberal construction of the statute

Esterline's alternative interpretation of the statutory time limit as a jurisdictional limit runs counter to the purpose of the Industrial Insurance Act. The Act is intended to provide "sure and certain relief for workers, injured in their work . . . regardless of questions of fault and to the exclusion of every other remedy, proceeding, or compensation, except as otherwise provided in this title." RCW 51.04.010; *Birrueta v. Dep't of Lab. & Indus*., 186 Wn.2d 537, 543, 379 P.3d 120 (2016). The Act is "remedial in nature and is to be liberally construed in order to achieve its purpose of providing compensation to all covered employees injured in their employment, with doubts resolved in favor of the worker." *Dennis*, 109 Wn.2d at 470; RCW 51.12.010.

This liberal construction only occurs if the statute is ambiguous (*Harris v. Dep't of Lab. & Indus*., 120 Wn.2d 461, 474, 843 P.2d 1056 (1993)), but here the statute uses the terms

"no application shall be valid" and no claim "enforceable" and does not use the term "jurisdiction." So it can be interpreted as a statute of limitation and not as a limitation on jurisdiction because the term jurisdiction is not used in the statute. *See Hoisington*, 99 Wn. App at 431 (examining statute to see whether "jurisdiction" term is used to determine meaning of statute); *Nickum*, 153 Wn. App. at 377-78 (same).

Esterline's interpretation of RCW 51.28.050 runs contrary to the principles of liberal construction, depriving injured workers of the sure and certain relief the Legislature sought to guarantee them. In the company's view, the statutory time limit to file a claim sets out a limit on the Department's subject matter jurisdiction, and so an employer remains free to raise this issue at any time. *See J.A. v. Dep't of Soc. & Health Servs.*, 120 Wn. App. 654, 657, 86 P.3d 202 (2004) ("A party may challenge subject matter jurisdiction at any time"); *see also* AB 9. But insofar as RCW 51.28.050 can be read to support this drastic result, Esterline's interpretation would lead only to

uncertainty, hardship, and suffering for injured workers. It cannot be the law that an employer may remain silent for years as its injured employee receives workers' compensation benefits, only to challenge the claim years later and seek repayment of those benefits. The Legislature did not intend RCW 51.28.050 as a means for employers to claw back years of previously unchallenged benefits. Because Esterline's interpretation conflicts with the Act's remedial purposes and gives no effect to the rule of liberal construction, this Court should reject it.

C. *Marley* Remains Good Law, and *Birrueta* Supports the Department, Not Esterline

Esterline points to *Birrueta*, 186 Wn.2d at 549, for the proposition that *Marley* has been "abrogated." AB 16. *Birrueta* held no such thing. Instead, this case involves an employer alleging "adjudicator error," which is challenged by filing a timely appeal under RCW 51.52.050, not through the special procedures discussed in *Birrueta* regarding clerical errors and similar issues. The Legislature requires self-insured employers

like Esterline to comply with the same 60-day appeal period applicable to all Department orders, which *Birrueta* did not disturb. Thus, contrary to the Esterline's assertion, *Birrueta* further supports the superior court's determination that the Department's allowance order was final and binding.

Birruetta involved a dispute about the meaning and application of RCW 51.32.240(1). *Birrueta*, 186 Wn.2d at 543-45. This repayment statute, which operates as an exception to the general 60-day limit to appeal a Department order, provides different time frames for seeking repayment of overpaid benefits depending on the type of error that resulted in the overpayment. If the error involved an innocent misrepresentation by the worker, the Department or self-insured employer has one year to seek an adjustment through an overpayment assessment. RCW 51.32.240 (1)(a). On the other hand, if the overpayment occurred due to adjudicator error, repayment must be must sought within 60 days—when the

payment order is "not yet final as provided in RCW 51.52.050 and 51.52.060." RCW 51.32.240 (1)(b).

Birrueta supports the Department, not Esterline. In assessing the type of error at issue, the Court explained that adjudicator error includes "errors of law, insufficiency of evidence, and errors in applying the law to the available information." *Birrueta*, 186 Wn.2d at 552. This is exactly the type of error that occurred here, not an error that would be subject to correction under RCW 51.32.240. And when a Department adjudicator makes such an error based on information in the claim file, a self-insured employer like Esterline must seek repayment of the overpaid benefits before the order becomes final. RCW 51.32.240 (1)(b).

The repayment statute's time limits confirm the Legislature's requirement that Department orders be promptly protested. While Esterline is correct that RCW 51.32.240 can function as an exception to RCW 51.52.050's 60-day time limit to appeal (AB 16-17), when it comes to the Department's legal

errors like the one here, the Legislature retained the same 60-day appeal period that applies to other Department orders. As the statute makes clear, the Legislature did not intend to provide the employers with the ability to appeal an order three years after it was issued.

Nor does this Court's decision in *Peterson* aid Esterline. *See* AB 16-17 (citing *Peterson v. Dep't of Lab. & Indus.*, 17 Wn. App. 2d 208, 485 P.3d 338 (2021)). There, the court interpreted RCW 51.12.100, which requires an injured maritime worker to reimburse the Department when the worker is later compensated under the Longshore and Harbor Worker's Compensation Act. *Peterson*, 17 Wn. App. at 221. Because RCW 51.12.100 "expressly provides benefits *shall* be repaid if recovery is subsequently made under federal maritime law," the Department cannot fully adjudicate a maritime worker's entitlement to benefits when it first allows a claim, and an award benefits is not final for the purposes of res judicata when the worker later obtains a federal recovery. *Id*.

Peterson has no application here. Unlike the future events at issue in *Peterson*, all necessary facts were available to the Department (and Esterline) when the Department allowed Colasurdo's claim. The threshold determination about the timeliness of the claim did not depend on any future events, and Esterline's belated realization that the claim was untimely hardly constitutes the type of contingent event at issue in *Peterson*.

Esterline argues that RCW 51.28.050 is an exception to finality, just as the statute in *Birrueta* is an exception to finality. But in contrast to those statutes that talk in express terms about different time limits to appeal an order (RCW 51.32.240) or explicitly about future events that have a limitation on finality (RCW 51.12.100), RCW 51.28.050 has language about how to file a claim but doesn't say anything about how to handle an order about claim filing where an appeal to that order wasn't raised within 60 days. Contrary to Esterline's argument, nothing in RCW 51.28.050 suggests that it functions as an

exception to the 60-day limit for appeal. AB 17. Rather, *Birrueta's* and *Peterson's* examination of the statutes at issues in those cases exemplifies the limited circumstances in which a final order can be disturbed. Esterline's three-year delay in filing an appeal is not one of them.

VI. CONCLUSION

The Department requests that this Court affirm the trial court order.

This document contains 5331 words, excluding the parts of the document exempted from the word count by RAP 18.17.

RESPECTFULLY SUBMITTED this 30th day of June, 2022.

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COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

MICHAEL COLASURDO JR, Plaintiff, v. ESTERLINE TECHNOLOGIES CORP. HYTEK FINISHES CO., Defendant.	CERTIFICATE OF SERVICE

The undersigned, under penalty of perjury pursuant to the laws of the State of Washington, declares that on the below date, she caused to be served the Department of Labor & Industries' Brief of Respondent, and this Certificate of Service in the below described manner:

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June 30, 2022 - 3:36 PM

Transmittal Information

Filed with Court:	Court of Appeals Division II
Appellate Court Case Number:	56509-9
Appellate Court Case Title:	Michael P. Colasurdo Jr., Respondent v Esterline Technologies Corp., Appellant
Superior Court Case Number:	20-2-08091-3

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